

Carlin speech signals DOJ white collar enforcement priorities

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In a recent speech, PADAG John Carlin previewed DOJ's refocused corporate enforcement efforts and priorities. He addressed a variety of topics, including an upcoming review and revision of white collar enforcement policies; a "surge" in resources; greater international cooperation and use of data-driven enforcement techniques; increased enforcement related to sanctions, export controls, and cryptocurrency; and warnings regarding resolution and subpoena compliance.

Principal Associate Deputy Attorney General John Carlin previewed the Department of Justice's (DOJ) refocused corporate enforcement efforts during a [speech](#) on October 5, 2021 at GIR Connect: New York. Carlin's speech underscored the primary levers a new administration can pull to quickly and meaningfully impact the white collar enforcement space: messaging increased white collar enforcement to relevant stakeholders, instituting new and revising existing policies, creating dedicated taskforces, and increasing resources for white collar enforcement. Carlin addressed each of these categories by outlining key DOJ priorities, including increased enforcement related to sanctions, export controls, and cryptocurrency; continued expansion of international cooperation and coordination; a "surge" in resources, exemplified by a new dedicated FBI squad for Foreign Corrupt Practices Act (FCPA), market integrity, and health care fraud investigations; an upcoming review and revision of corporate enforcement policies; continued and increased use of data-driven enforcement techniques; enhanced and expanded international cooperation; and a warning regarding companies' compliance with subpoenas and the terms of resolution agreements.

1. Revision of white collar policies

While many anticipated a review and revision of DOJ's policies by the new administration, Carlin confirmed that DOJ plans to reassess and potentially update some of its most influential corporate enforcement policies in the near future. In particular, he previewed possible changes to policies regarding the role of individual accountability in white collar enforcement, the use and application of corporate resolutions, and the weight given to cooperation efforts. Carlin said that DOJ's evaluation of its corporate prosecution policies and guidance would be rooted in the administration's stated priorities of enhancing public trust not only in corporations but also in the capacity of regulators to provide impactful oversight.

One anticipated area of revision is the requirement that companies provide information related to individuals in order to receive cooperation credit from DOJ. The "Yates memo," which required companies to provide information related to all individuals involved in the alleged misconduct in order to receive any cooperation credit, was narrowed during the Trump Administration to require that companies need only provide information related to those individuals "substantially involved in or responsible for" the alleged misconduct. Commentators have speculated that the Biden Administration will revert back to the Yates formulation.

It is unlikely, however, that all policies across the board will be revised. For example, given that Carlin cited approvingly of the DOJ National Security Division's (NSD) voluntary disclosure policy—which incentivizes companies to identify and voluntarily self-disclose sanctions and export control violations—and that the FCPA Corporate Enforcement Policy was initially instituted as a pilot program during the Obama Administration, it is unlikely that these policies will see drastic pull-backs.

Carlin stated that more information about potential changes to the corporate enforcement policies is going to be announced in the coming weeks.

2. Surge in resources

Carlin emphasized DOJ's redoubled commitment and a forthcoming "surge" of resources for corporate enforcement to support investigation and prosecution efforts. As an example, he cited the creation of a new FBI squad dedicated to DOJ's Criminal Division, Fraud Section, which investigates and prosecutes all FCPA violations, as well as commodities and securities fraud, fraud involving cryptocurrency and financial institutions, and health care fraud. This dedicated squad will mean increased capacity to investigate these types of misconduct and, as Carlin explained, will enable greater focus on data-driven initiatives and cases, including programs focused on predicting corporate misconduct.

The Biden Administration's commitment to enhancing white collar enforcement through the use of specialized and inter-agency task forces is further underscored by the recent establishment of Joint Task Force Alpha, which will marshal the resources of DOJ and its partners (both domestic and foreign) to combat corruption in the Northern Triangle nations of Guatemala, El Salvador, and Honduras. President Biden's June 3 [Executive Memorandum](#) also initiated an interagency review process that includes DOJ and sets the goal of developing a strategy that will more appropriately resource and empower key agencies to promote good governance and combat corruption internationally.

In light of these initiatives and Carlin's announcement of a "surge" in resources, including citation to this FBI squad as but one example of such a surge, clients should expect yet additional resources to be allocated to white collar enforcement and a corresponding increase in investigations.

3. Increased use of data

As a corollary to the announcement of an FBI squad dedicated to data-driven initiatives, Carlin also previewed an increase in the use of data to investigate and prosecute white collar crimes more generally. While DOJ has long used data-driven techniques to investigate white collar crime, Carlin explained that such techniques now provide additional opportunities not only to hold criminals accountable, but also to predict and deter crime. Carlin cited as examples the Fraud Section's longstanding use of data analytics in the health care fraud and financial services fraud arena, and the U.S. Securities and Exchange Commission's (SEC) and SDNY's use of data analysis in connection with insider trading cases. He also noted that DOJ will continue to enhance its use of data-driven analytics across a variety of other white collar crimes, and that DOJ will expect corporations to embed and apply similar analytics in their compliance programs to identify and anticipate misconduct. The Criminal Division's Evaluation of Corporate Compliance Program, for example, was revised in 2020 to include additional questions and topics related to data analysis. Carlin noted that the best use of data will involve close working relationships with regulatory and other partners, adding that sharing the "same fruits of analytic labor" will be key.

4. Increased focus on sanctions and export control

A substantial portion of Carlin's speech focused on the recent trend of increased enforcement of sanctions and export controls, with open investigations now totaling 150. He noted that this enforcement activity is critical to protecting national security and U.S. technology, and that he expected this upward trend to continue. Carlin also conveyed an expectation that sanctions and export control enforcement would benefit from continued use of new tools and innovations. Among others, this includes a broader conception of what constitutes an export control violation. Carlin explained that now, the focus is not only on the transference of intellectual property, but also on "human knowledge," citing a recent deferred prosecution agreement (DPA) involving three U.S. citizens who agreed to pay over \$1.6 million for serving as "hackers for hire" for another government.

Carlin encouraged companies to increase their familiarity with the DOJ NSD policy incentivizing companies to identify and voluntarily self-disclose sanctions and export control violations, close in kind to the FCPA Corporate Enforcement Policy. Deeming it a "proof of concept," he spotlighted the first non-prosecution agreement (NPA) reached as a result of the NSD policy in April 2021, in which SAP, a German software company, was required only to disgorge gains, without a fine or requiring a monitor, resulting from the company's voluntary disclosure, extensive cooperation, and strong remediation.

Carlin's remarks come at a time when the Treasury Department has [expressed](#) an intent to use economic and financial sanctions more strategically. There have been sixteen enforcement actions by the Treasury Department's Office of Foreign Assets Control (OFAC) to date this year. Last month, for instance, OFAC settled with a Texas-based oil and gas

supplier, Cameron International Corporation, for providing services to a sanctioned Russian energy firm. On Monday, however, Treasury Department officials said that while sanctions will remain a critical policy tool, they need to be better calibrated. Still, as the list of sanctioned countries and individuals continues to grow, clients will need to exercise additional due diligence to ensure compliance.

5. Increased enforcement of cryptocurrency crime

In addition to DOJ's focus on sanctions and export control enforcement, Carlin stressed that cryptocurrency was "ripe for vigorous enforcement." He cited its increasing prominence in a variety of criminal activities, including its use in drug transactions, child exploitation, ransomware attacks, and terrorism. Carlin teased "additional announcements about increasing [DOJ's] capacity and changing [its] structure as it comes to cryptocurrency enforcement." We now know that Carlin was referring to Deputy Attorney General Lisa Monaco's [announcement](#) the next day of a new National Cryptocurrency Enforcement Team—which will tackle complex criminal misuses of cryptocurrency, particularly by virtual currency exchanges, mixing and tumbling services, and money laundering infrastructure actors—and a new civil-cyber initiative that will use civil enforcement tools to try ensure compliance with recommended cybersecurity standards.

In his speech, Carlin referred to several tools DOJ intends to use to improve and increase its cryptocurrency crime enforcement capacity. The Bank Secrecy Act—including its requirement for financial institutions to maintain an adequate anti-money laundering compliance program and comply with record-keeping and reporting requirements—is one such tool. In addition, the recently-passed Anti-Money Laundering Act (AMLA) also has several provisions that DOJ is likely to use in enforcing cryptocurrency crimes. More generally, DOJ plans to better safeguard the financial system and the American public by increasing burdens on cryptocurrency exchange operators, holding conversion facilitators accountable, and continuing to study peer-to-peer and offshore exchanges.

DOJ's amplified focus is likely to lead to additional investigations of cryptocurrency-related money laundering, sanctions, and fraud, and comes at a time when the SEC, Commodity Futures Trading Commission (CFTC), and OFAC similarly have been messaging and exhibiting increased regulation and enforcement in this space. Carlin, in fact, highlighted a recent announcement by OFAC to designate a virtual currency exchange for allegedly facilitating financial transactions used in connection with ransomware attacks. Carlin announced that DOJ will be working in parallel with the SEC, CFTC, FinCEN, OFAC, and IRS to "maximize" enforcement impact in this space. As in other contexts, such parallel actions will pose challenges and risks to clients as they navigate investigations and demands by multiple authorities.

6. International cooperation

In describing tools needed to enhance DOJ's cryptocurrency crime enforcement, Carlin specified the need for input from international law enforcement partners. This is consistent with a broader recent trend in which DOJ has expanded the range of international authorities with which it cooperates, a trend we expect to continue under the current administration.

Recent notable enforcement actions reflect this critical focus on cooperation with international authorities, including the recent FCPA enforcement action involving Amec Foster Wheeler. There, DOJ, in coordination with British and Brazilian authorities, entered into a three-year DPA with the U.K.-based engineering company, requiring it to pay an \$18 million penalty to resolve charges stemming from a bribery scheme in Brazil. International cooperation like this has become a common and important aspect of FCPA enforcement in recent years, and all signs point to it becoming even more so under the Biden Administration. On June 3, President Biden issued an [Executive Memorandum](#) directing his administration to formulate a strategy to "[w]ork with international partners to counteract strategic corruption" and "[e]nhance efforts to quickly and flexibly increase United States and partner resources of investigative, financial, technical, political, and other assistance to foreign countries that exhibit the desire to reduce corruption."

It appears that DOJ will attempt to replicate the international coordination and cooperation seen in the anti-corruption space, and more generally in the national security area, in other white collar crimes, including cryptocurrency and cyber/ransomware. This increased cooperation will likely lead to additional challenges to companies facing multi-jurisdictional investigations. Although DOJ's "Anti-Piling On" policy may mitigate the imposition of duplicative penalties for the same underlying conduct by multiple authorities where such authorities are intent on coordinating with one another, the policy does not remedy the broader problems that can arise during the pendency of an investigation or resolution, including unwillingness by certain authorities to coordinate, competing legal regimes or practices, and conflicting demands by different authorities.

7. Scrutiny of resolution agreement obligations

Carlin also highlighted DOJ's commitment to stringently enforce violations of NPAs, DPAs, and plea agreements, warning that violations of such agreements may engender more painful results than originally posed by the underlying charges. Carlin's remarks were a reminder of then-Assistant Attorney General Leslie Caldwell's 2015 [speech](#) in which she cautioned that when a company under an existing agreement fails to cooperate or engages in new misconduct, the Criminal Division "will not hesitate to tear up a DPA or NPA and file criminal charges" where appropriate. Despite Carlin's warning, he made clear that DOJ is not rooting for companies under resolution agreements to fail, but rather is aligned with companies in their desire to succeed. Thus, although DOJ is not searching for opportunities to declare a breach, clients should expect DOJ to scrutinize companies' compliance with the obligations imposed by resolution agreements.

8. Subpoena compliance

Lastly, Carlin underscored the importance of timely and full compliance with subpoenas. His remarks particularly targeted companies accustomed to receiving such requests, citing banks, technology companies, and telecommunications providers as examples. He advised that prosecutors have been instructed to "explore all options" when companies "systemically fail" to adequately respond to subpoenas and other inquiries. This warning takes on additional importance given the AMLA's expansion of DOJ's ability to subpoena foreign banks for records where the foreign bank maintains a correspondence account in the United States.

Carlin's speech can be found [here](#).

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